No. 87-573

In the Supreme Court of the United States

OCTOBER TERM, 1987

UNITED STATES OF AMERICA, PETITIONER

v.

LARRY LEE TAYLOR

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

CHARLES FRIED
Solicitor General

WILLIAM F. WELD
Assistant Attorney General

WILLIAM C. BRYSON
Deputy Solicitor General

HARRIET S. SHAPIRO
Assistant to the Solicitor General

PATTY MERKAMP STEMLER
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether a minor violation of the time limitations of the Speedy Trial Act of 1974, 18 U.S.C. (& Supp. IV) 3161 *et seq.*, justifies the dismissal with prejudice of an indictment charging a serious crime.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases – Continued: Page

Cases – Continued: Page

Constitution, statutes and rule:

In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-573

UNITED STATES OF AMERICA, PETITIONER

v.

LARRY LEE TAYLOR

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-22a) is reported at 821 F.2d 1377. The order of the district court dismissing the indictment with prejudice (Pet. App. 23a-33a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 13, 1987. On September 1, 1987, Justice Scalia extended the time in which to file a petition for a writ of certiorari to and including October 11, 1987. The petition was filed on October 7, 1987, and was granted on January 19, 1988. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTE INVOLVED

The Speedy Trial Act of 1974 provides in pertinent part (18 U.S.C. 3162(a)(2)):

> If a defendant is not brought to trial within the time limit required by section 3161(c) as extended by section 3161(h), the information or indictment shall be dismissed on motion of the defendant. * * * In determining whether to dismiss the case with or without prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of this chapter and on the administration of justice.

STATEMENT

1. On July 25, 1984, respondent was charged in a two-count indictment in the United States District Court for the Western District of Washington. The indictment alleged that respondent and two others had conspired to distribute cocaine, in violation of 21 U.S.C. 846, and had possessed 400 grams of cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(A) (E.R. 1-2).[1] Trial was scheduled to begin on November 19, 1984, which the parties agreed was one day before the end of the 70-day period allowed for commencing trial under the Speedy Trial Act, 18 U.S.C. 3161(c)(1) (E.R. 13; J.A. 8). On the day of trial, however, respondent failed to appear.

[1] "E.R." refers to the Excerpt of Record filed in the court of appeals. It contains the pleadings, exhibits, and affidavits on which the district court based its ruling on the speedy trial motion. There was no hearing on that motion.

He was declared to be a fugitive, and a bench warrant was issued for his arrest (E.R. 50, 57; J.A. 12).[2]

On February 5, 1985, respondent was arrested by local police officers in San Mateo County, California, for failure to appear on local petty theft charges (E.R. 17, 21, 50). Two days later, the United States District Court for the Northern District of California issued a writ of habeas corpus ad testificandum directing the local authorities to make respondent available to appear as a defense witness in *United States* v. *Seigert*, No. CR-84-0689RFD, a federal narcotics prosecution that was pending in the Northern District of California (E.R. 50). On February 7, 1985, the United States Marshals Service took custody of respondent pursuant to the writ and arranged for him to be held in the San Francisco County jail pending his appearance in the *Seigert* trial (E.R. 50-51). Respondent testified in that case on February 21, 1985, and following his testimony he was held for possible recall in that trial (E.R. 51). The *Seigert* trial ended in a mistrial the following day.

On February 28, 1985, the pending state charges against respondent were dismissed on motion of the district attorney in San Mateo County (E.R. 25, 26, 51). The United States Marshal was notified of the dismissal on the following day, March 1, 1985, which was a Friday (E.R. 51). The State's notice informed the marshal that "effective today [respondent] becomes your prisoner" (*ibid.*).

The following Wednesday (March 6, 1985), respondent made an initial appearance before a federal magistrate in

[2] Respondent and his co-defendants, Ann Angeli and John Romani, had been scheduled to be tried together. After respondent failed to appear, Angeli entered into a plea agreement with the government and the trial of Romani and petitioner was continued until January 15, 1985. On that date, respondent was still a fugitive. Romani was then tried alone by a jury and was convicted on both counts.

the Northern District of California in connection with the bench warrant from the Western District of Washington (E.R. 52). See Fed. R. Crim. P. 40(e). At that time, the magistrate scheduled a further hearing for March 8, 1985, in the proceeding to return respondent to Washington (E.R. 52, 74-81). On March 8, the magistrate, at respondent's request, ordered a physical examination of respondent (E.R. 52, 60, 86-87). At the March 8 hearing, defense counsel also informed the court that he was in no hurry to have respondent returned to Washington. Counsel explained (E.R. 85):

> I assume that we are going to return, Your Honor. What I propose is we set a removal hearing. * * * I would not take the Court's time to have a removal hearing, but I would rather keep him here and organize what is gonna happen and talk to [Assistant U.S. Attorney] Wales up in Seattle.

The court then scheduled a status conference on the removal proceedings for March 18 (E.R. 52, 86). On that date, at respondent's request, the removal hearing was set for April 3 (E.R. 52, 88-89). At the time set for the removal hearing, respondent waived his right to a hearing and was ordered removed to the Western District of Washington (E.R. 52).

During the next 14 days, the marshal, in accordance with standard procedures, assembled several prisoners who had to travel northward. On April 17, 1985, respondent began his trip to Washington. The following day, while respondent was in Oregon on his way back to Washington, the district court in the Northern District of California issued a second writ of habeas corpus ad testificandum, compelling respondent's presence to testify as a defense witness at the retrial in the *Seigert* case (E.R. 44). Petitioner was then promptly returned to San Francisco to testify at that trial. On April 24, while respondent was waiting to testify in the *Seigert* case, a superseding indictment was returned against respondent in the Western District of Washington. E.R. 52-53. The superseding indictment realleged the two pending narcotics charges and added a third count charging respondent with failing to appear before a court as required, in violation of 18 U.S.C. 3150 (E.R. 3-5). The *Seigert* retrial began on May 7, 1985. After respondent's testimony was completed, he was returned to the Western District of Washington on May 17, 1985. E.R. 53. Before he could be retried, he moved to dismiss the superseding indictment, asserting that the delay in bringing him to trial had resulted in a violation of the 70-day time limit of the Speedy Trial Act. E.R. 6-12.

2. The district court granted respondent's speedy trial motion and dismissed the two narcotics counts (Pet. App. 23a-33a).[3] The court and the parties agreed that only one day remained on the speedy trial clock when respondent failed to appear at trial in November 1984.[4] On that

---

[3] The court's determination that the Act had been violated applied only to the narcotics counts, which had been included in the original indictment. The court found no speedy trial violation with respect to the failure to appear count that was added in the superseding indictment. Pet. App. 32a-33a. Respondent subsequently pleaded guilty to that count.

[4] That conclusion was based on a now-outmoded method of calculating speedy trial time. Under that method, which was recommended by the Committee on the Administration of the Criminal Law, Judicial Conference of the United States, in its publication, *Guidelines to the Administration of the Speedy Trial Act of 1974, as Amended* 68-70 (rev. 1979, with amendments through Oct. 1984), an "ends of justice" continuance granted under Section 3161(h)(8) would be "tacked on" to the end of the 70-day period; it would not stop the running of the speedy trial clock at the time the continuance was granted. Therefore, when the continuance ended, the speedy trial

understanding, the government had only one day of non-excludable time within which to bring respondent to trial following his capture on February 5, 1985. *Id.* at 26a.

In calculating the number of days that had passed for speedy trial purposes, the district court excluded the 78-day period between respondent's November trial date and his capture in February as time during which respondent was "absent" under Section 3161(h)(3)(A) of the Act. The court also excluded the period between February 7 and February 22 as a period of delay attributable to the pending state charges and respondent's appearance at the first trial in the *Seigert* case. But the court found that the speedy trial clock began to run on February 23, the day after the first *Seigert* trial ended. The court counted the period between February 23 and March 1, even though the state charges were still pending during that time. The court held that that period should be counted because the United States Marshals Service had not formally returned respondent to the custody of the state authorities, even though he was being held in a state facility during that time (Pet. App. 27a-28a). In addition, the court counted the period between March 1 and March 5 as non-excludable time for speedy trial purposes. The court concluded (*id.* at 24a-25a) that once the marshal learned on March 1 that the state charges had been dismissed, the

---

period would expire as well. It is now clear that that is not the correct method for calculating speedy trial time. Instead, the courts that have analyzed the issue have held that the grant of a continuance stops the speedy trial clock altogether until the continuance comes to an end. See, *e.g.*, *United States* v. *Gallardo*, 773 F.2d 1496 (9th Cir. 1985); *United States* v. *Campbell*, 706 F.2d 1138 (11th Cir. 1983). Under that method of calculation, there would have been 42 days of speedy trial time left at the time respondent became a fugitive, so that there would have been no speedy trial violation in this case. We did not raise that argument in the courts below, and we therefore do not press it here.

marshal should have brought respondent before a federal magistrate immediately for an initial appearance on the bench warrant. See Fed. R. Crim. P. 40(e). Because the marshal did not bring respondent before a magistrate until March 6, the court refused to exclude that period of delay. Pet. App. 27a-28a.

Applying Section 3161(h)(1)(G), the district court excluded the entire period between respondent's initial appearance on the bench warrant on March 6 and the removal order on April 3 as a period of delay resulting from the removal proceedings. The court excluded the next ten days as a reasonable period of time for transporting respondent back to Washington, under Section 3161(h)(1)(H). The court, however, refused to exclude the full 14 days that it took the marshal to arrange for respondent's transportation back to Washington. In the district court's view, the marshal had improperly elevated his concern for the economies resulting from group transportation over respondent's right to a speedy trial. Finally, the court excluded all the remaining time after respondent was subpoenaed to testify at the second *Seigert* trial as a period of delay resulting from respondent's participation in that trial and his second journey back to Washington. Pet. App. 28a-29a.

Based on that analysis, the district court concluded that a total of 15 non-excludable days had elapsed between respondent's apprehension in February and his ultimate return to Washington for trial. Because the parties agreed that there was only one day left on the speedy trial clock when respondent absconded, the court found that the 70-day limit of the Act had been exceeded by 14 days and that the indictment therefore had to be dismissed. Pet. App. 29a.

The district court then considered whether to dismiss the indictment with or without prejudice. The court acknowl-

edged that the offenses at issue were serious, but it held that the circumstances leading to the Speedy Trial Act violation tended "strongly to support the conclusion that the dismissal must be with prejudice" (Pet. App. 30a). The court characterized the government's behavior after respondent's recapture as "lackadaisical" (*ibid.*). In making that characterization, the court pointed to the government's failure to return respondent to state custody after his first appearance in *Seigert*, the five-day delay between the dismissal of the state charges and respondent's appearance in connection with the removal proceedings, and the 14-day delay after the removal order before respondent was sent back to Washington (*ibid.*). Based on the government's conduct, the court concluded that the indictment had to be dismissed with prejudice, or else "the [Speedy Trial Act] would become a hollow guarantee" (*id.* at 31a).

3. The court of appeals affirmed in a divided opinion (Pet. App. 1a-22a). With respect to the question whether the Speedy Trial Act had been violated, the court of appeals agreed with the district court that the Act's 70-day limit had been exceeded by 14 days (*id.* at 16a). On the issue of remedy, the court then upheld the district court's decision to dismiss the indictment with prejudice. It addressed the factors enumerated in Section 3162(a)(2) and acknowledged that several of those factors seemed to favor dismissal without prejudice. For instance, the court agreed with the district court that the offenses were serious. The court also conceded that the length of the delay was "not so great as to mandate dismissal with prejudice" (Pet. App. 17a). And the court found "no indication" that the delay had impaired respondent's ability to defend against the narcotics charges. Nonetheless, the court asserted that respondent had suffered prejudice because he was incarcerated during the entire period

(*ibid.*). Moreover, the court concluded that the purpose of the district court's order was to send "a strong message to the government" that the Speedy Trial Act "must be observed, despite the government's apparent antipathy toward a recaptured fugitive" (*id.* at 18a). For that reason, the court concluded that the district court had not abused its discretion by entering a "with prejudice" dismissal.

Judge Poole dissented on the remedy issue. In his view, the district court had abused its discretion by dismissing the indictment with prejudice (Pet. App. 19a). Judge Poole found that the government was not at fault for any of the delay before March 1, when the marshal learned that the state charges had been dismissed.[5] Noting that the marshal had learned about the dismissal of the state charges on a Friday, Judge Poole further concluded that the marshal could not be charged with neglect for failing to bring respondent before a magistrate until the following week (*id.* at 21a). Judge Poole also explained (*id.* at 21a-22a) that it took the marshal 14 days rather than 10 days to transport respondent back to Washington after his removal hearing because of the need "to collect a larger number of prisoners for simultaneous transport in order to effect economy of expenses."

In light of these considerations, Judge Poole concluded that the delay in the case, although not excludable under the statute, was not "of such studied, deliberate, and callous nature as to justify dismissal with prejudice" (Pet.

---

[5] Judge Poole observed that the San Mateo authorities could have obtained custody of respondent, who was incarcerated during and after the *Seigert* trial in the San Francisco County jail, simply by asking the marshal to sign the required papers. Furthermore, Judge Poole concluded that the government could not be faulted for failing to return respondent to Washington during that period, since the California state charges were still pending at that time. Pet. App. 20a-21a.

App. 22a). Judge Poole further found it incongruous that by fleeing the day before his scheduled trial, respondent became "the instrument of his own deliverance" (*ibid.*). As Judge Poole explained (*ibid.*), respondent "created his own 78-day 'excludable time' by his own will, traveling from Seattle to California where he became the subject of criminal charges in two jurisdictions 800 miles away from the place of trial." Judge Poole found it "ironic that the statutory scheme which would have assured his orderly trial in November 1984, is resorted to, five months later, as the reason for 'springing' him to freedom and conferring upon him complete absolution from further prosecution" (*ibid.*). To release respondent altogether because of the minor violation of the Speedy Trial Act, Judge Poole concluded, "reflects badly upon our notions of sound, evenhanded administration of justice" (*ibid.*).

SUMMARY OF ARGUMENT

Section 3162(a)(2) of the Speedy Trial Act provides that in the event of a violation of the 70-day time limit of the Act, a court must dismiss the charges on motion of the defendant. It does not, however, require that the indictment be dismissed with prejudice. Instead, it provides that in determining whether to permit reprosecution, the court must consider several factors, including the seriousness of the offense, the facts and circumstances of the case, and the effect of reprosecution on the administration of justice and the administration of the Speedy Trial Act.

The provision authorizing dismissals to be made without prejudice was the subject of close congressional attention; without that provision, the sponsors acknowledged, the Act would not have had sufficient support in Congress to pass. Both the language of Section 3162(a)(2) and its legislative history make it clear that Congress did not intend for courts routinely to dismiss indictments with

prejudice whenever a Speedy Trial Act violation is found. Nor is it consistent with the statute for courts to dismiss indictments with prejudice solely on the ground that dismissals with prejudice will be more effective than dismissals without prejudice in inducing the government to take care to avoid Speedy Trial Act violations in the future. Instead, the statute specifically requires the courts to consider each of several factors bearing on the question whether reprosecution should be permitted.

In this case, virtually every pertinent factor cuts in favor of permitting reprosecution. The crimes at issue were serious, as the district court and the court of appeals acknowledged. The period of delay was quite short—only eight days according to our calculation, and only 14 days even according to the district court's calculation. Respondent suffered no prejudice of any sort from the delay: he was not injured in his ability to defend himself at trial, and the delay did not result in any additional period of incarceration, since he was being held during the same period in connection with the bench warrant for failing to appear at his trial in Washington, as to which there was no Speedy Trial Act violation. Moreover, while the district court and the court of appeals regarded the government as being at fault for the short period of pretrial delay that occurred during the process of returning respondent from California to Washington, those courts ignored the fact that it was respondent himself who ultimately caused that delay by fleeing from Washington prior to trial. Respondent indulged in self-help to avoid a speedy trial by fleeing the jurisdiction; his subsequent complaint about the government's negligence in arranging for his prompt return to Washington must be assessed in light of his own role in the matter. Finally, to bar reprosecution would adversely affect the administration of justice by creating an additional and improper incentive for indicted defend-

ants to flee, and by disserving the public interest in seeing that serious narcotics offenders are punished, rather than being released without a fair determination of their guilt.

The only factor cutting in favor of dismissal with prejudice in this case is the effect of such a dismissal on the administration of the Speedy Trial Act, *i.e.*, the didactic effect of a "with prejudice" dismissal in encouraging the government to comply with the requirements of the Act. That factor, however, can always be invoked in favor of dismissing cases with prejudice, since dismissals with prejudice invariably put more pressure on the government to comply with the Act than do dismissals without prejudice. To attach virtually conclusive weight to that factor, as the courts below did in this case, is to ignore the balancing test created by Section 3162(a)(2). Rather than complying with the statutory directive, the approach employed by the courts below was more consistent with the legislative proposals that Congress rejected, which would have required dismissals with prejudice in all or virtually all cases.

Although district courts enjoy discretion under Section 3162(a)(2) to decide whether Speedy Trial Act dismissals should be with or without prejudice, the courts abuse that discretion if they fail to give meaningful consideration to each of the statutory factors set forth in Section 3162(a)(2), or if they commit a clear error of judgment in weighing those factors. In this case, the district court committed both errors when it failed to attach significant weight to the several factors that favored dismissal without prejudice, and when it held that a "with prejudice" dismissal was appropriate even though this case, by any fair assessment, is an extremely strong candidate for dismissal without prejudice. Indeed, it is difficult to imagine how the case for dismissal without prejudice could be much stronger than it was in this case; if dismissal with prejudice is appropriate here, then either a district court's

decision to select that remedy is effectively unreviewable or Section 3162(a)(2) must be read as incorporating a strong presumption against reprosecution.

ARGUMENT

A MINOR VIOLATION OF THE TIME LIMITATIONS OF THE SPEEDY TRIAL ACT DOES NOT JUSTIFY THE DISMISSAL WITH PREJUDICE OF AN INDICTMENT CHARGING A SERIOUS CRIME

The Speedy Trial Act of 1974, 18 U.S.C. (& Supp. IV) 3161 *et seq.*, provides that trial must commence within 70 days of the filing of charges or the defendant's first appearance in the charging district. 18 U.S.C. 3161(c)(1). If the defendant shows that the trial has not begun within that 70-day period, not counting periods of delay that are excludable under the Act (see 18 U.S.C. (& Supp. IV) 3161(h)(1)-(9)), the charges must be dismissed.[6] The Act, however, does not require that the indictment be dismissed with prejudice. Instead, Section 3162(a)(2) of the Act provides that a dismissal for violation of the 70-day time limit

---

[6] Where the defendant alleges a violation of the 70-day indictment-to-trial period, dismissal is mandatory only if the defendant moves for dismissal on statutory speedy trial grounds prior to trial. If he does not, he has waived his right to dismissal under the Act. *United States* v. *Andrews*, 790 F.2d 803, 809-810 (10th Cir. 1986), cert. denied, No. 86-5960 (Apr. 20, 1987); *United States* v. *Ballard*, 779 F.2d 287, 294 (5th Cir.), cert. denied, 475 U.S. 1109 (1986); *United States* v. *Tenorio-Angel*, 756 F.2d 1505, 1508 (11th Cir. 1985); *United States* v. *Tercero*, 640 F.2d 190, 195 (9th Cir. 1980), cert. denied, 449 U.S. 1084 (1981); *United States* v. *Little*, 567 F.2d 346, 349 (8th Cir. 1977), cert. denied, 435 U.S. 969 (1978). The defendant bears the burden of proof in establishing that there has been a violation of the 70-day time limit. 18 U.S.C. 3162(a)(2); *United States* v. *Melguizo*, 824 F.2d 370, 372 (5th Cir. 1987), petition for cert. pending, No. 87-551.

may be with or without prejudice to any reprosecution.[7] To determine which sanction is appropriate in a particular case, Section 3162(a)(2) sets forth a balancing test that the court must employ. It requires the court to consider each of the following factors, among others: "the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of [the Speedy Trial Act] and on the administration of justice."[8]

---

[7] A similar scheme applies to the provision of the Act that requires that an indictment be returned within 30 days of the defendant's arrest on a federal complaint. 18 U.S.C. 3161(b). When the 30-day arrest-to-indictment limit is exceeded, the indictment must be dismissed, but the dismissal need not be with prejudice. 18 U.S.C. 3162(a)(1). Compare, *e.g.*, *United States* v. *Caparella*, 716 F.2d 976 (2d Cir. 1983) (with prejudice), with *United States* v. *Carreon*, 626 F.2d 528, 534 (7th Cir. 1980) (without prejudice) and *United States* v. *Bittle*, 699 F.2d 1201, 1207-1208 (D.C. Cir. 1983) (same).

[8] By contrast, when a defendant's rights under the Sixth Amendment's Speedy Trial Clause have been violated, dismissal with prejudice is "the only possible remedy." *Strunk* v. *United States*, 412 U.S. 434, 440 (1973), quoting *Barker* v. *Wingo*, 407 U.S. 514, 522 (1972). There are, of course, fundamental differences between a Sixth Amendment speedy trial violation and a statutory Speedy Trial Act violation. To give rise to a constitutional violation, the delay between indictment and trial ordinarily must be substantial, while a Speedy Trial Act violation can occur after the passage of as little as 71 days between indictment and trial. In addition, a court reviewing a constitutional speedy trial claim must consider not only the length of the delay, but also the relative culpability of the parties in causing the delay, the defendant's assertion of his right to a speedy trial, and the prejudice, if any, to the defendant. *Barker* v. *Wingo*, 407 U.S. at 530. Usually, a Sixth Amendment violation will be found only where the defendant has been prejudiced by extraordinary delay that he did not cause. A Speedy Trial Act violation, by contrast, results merely from the passage of more than 70 days of nonexcludable time between indictment and trial. Factors such as the relative culpability of the parties, the length of the delay, and prejudice to the defendant do not go to the question whether there has been a violation, or whether there should be a dismissal, but whether the dismissal should be with or without prejudice.

The district court purported to apply this statutory balancing test. In fact, however, the court entered a "with prejudice" dismissal for only one reason: because, in the court's view, the government had acted in a "lackadaisical" manner in arranging for the removal proceedings and respondent's return to Washington (Pet. App. 30a). To permit the government to reindict respondent, the court concluded, would "tacitly condone[]" the government's conduct and render the Speedy Trial Act a "hollow guarantee" (*id.* at 30a-31a).

The court of appeals, like the district court, recognized that several of the factors bearing on the statutory balancing test favored dismissal without prejudice: the crimes at issue were serious (Pet. App. 16a, 30a); the period of delay was not lengthy (*id.* at 16a-17a); and the delay did not result in any apparent prejudice to respondent's ability to prepare a defense at trial (*id.* at 17a). Nonetheless, the court of appeals held that the district court's rationale—"to send a strong message to the government that the [Speedy Trial Act] must be observed" (*id.* at 18a)—was a sufficient justification for a "with prejudice" dismissal, even in the face of all the factors that favored a dismissal without prejudice. We submit that dismissing an indictment with prejudice for didactic reasons alone is inconsistent both with the terms of the statute and with the policies that Congress sought to promote when it adopted the balancing test of Section 3162(a)(2).

A. Dismissal With Prejudice Is Not Justified Under Section 3162(a)(2) Simply to Encourage Compliance With the Speedy Trial Act

When it enacted the Speedy Trial Act of 1974, Congress intended first and foremost to protect the public's right to speedy justice. As the 1974 House Report stated, "[t]he purpose of this bill is to assist in reducing crime and the danger of recidivism by requiring speedy trial." H.R. Rep. 93-1508, 93d Cong., 2d Sess. 8 (1974). The specific time limits for bringing a case to trial were selected on the basis of studies showing "the amount of time it takes an individual who is on bail to be rearrested for a subsequent crime" (*id.* at 14). Accord S. Rep. 93-1021, 93d Cong., 2d Sess. 8 (1974). The time limits were thus chosen principally to reduce repeat offenses. To ensure that the government would adhere to the time limits and thereby protect the public's interest in a swift resolution of the issue of guilt, Congress required that any violation of the time limits would result in dismissal of the charges.[9]

Prior to the Act's passage, no provision engendered more controversy than the dismissal sanction. A. Partridge, *Legislative History of Title I of the Speedy Trial Act of 1974*, at 31-33 (Fed. Judicial Center 1980). The

[9] Only violations of the 30-day arrest-to-indictment time limit and the 70-day indictment-to-trial time limit require dismissal of the indictment. The mandatory dismissal sanction does not apply to violations of the 90-day limit on continuous pretrial confinement (18 U.S.C. 3164; see *United States* v. *Theron*, 782 F.2d 1510, 1515-1516 (10th Cir. 1986)); violations of the requirement that the government promptly notify a prisoner who is serving a sentence elsewhere that he has a right to a speedy trial on the pending federal charges (18 U.S.C. 3161(j); see *United States* v. *Anderton*, 752 F.2d 1005, 1008 (5th Cir. 1985)); and violations of the requirement that trial not commence less than 30 days following the defendant's first appearance with counsel (18 U.S.C. 3161(c)(2); see *United States* v. *Daly*, 716 F.2d 1499, 1506 (9th Cir. 1983), cert. dismissed, 465 U.S. 1075 (1984)).

debate focused on two countervailing concerns. Some of the sponsors of the legislation believed that in the absence of an absolute discharge for the defendant, the time limits of the Act would be merely precatory. See, *e.g.*, *Speedy Trial: Hearings on S. 895 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 92d Cong., 1st Sess. 21 (1971) [hereinafter *1971 Senate Hearings*]. (testimony of Sen. Hart) Thus, the House bill, H.R. 17409, 93d Cong., 2d Sess. § 101 (1974), provided that a speedy trial dismissal "shall forever bar prosecution of the individual for that offense or any offense based on the same conduct." The Senate bill was nearly as stringent. It permitted reindictment only where "the attorney for the government has presented compelling evidence that the delay was caused by exceptional circumstances." S. 754, 93d Cong., 2d Sess. § 101 (1974).

The opponents of these harsh sanctions feared that in light of the relatively short time limits for bringing a defendant to trial, a bar to reprosecution would in many cases unreasonably permit a criminal to escape punishment. See, *e.g.*, *Speedy Trial: Hearings on S. 754 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 93d Cong., 1st Sess. 166 (1973) (statement of Sen. McClellan) (violation of the time limits "ought not to result in a guilty man going free"); *id.* at 139-140 (statement of Dallin H. Oaks) ("[T]he sanction of mandatory dismissal with prejudice is too radical. * * * There must be equally effective and far less costly ways of controlling the actions of dedicated public servants."). See also *1971 Senate Hearings* 195-196 (letter from Richard H. Seeburger); *id.* at 159 (letter from Edward L. Barrett). During the 1974 House Hearings, a member of the Advisory Committee of United States Attorneys proposed that a balancing test be used to determine whether reprose-

cution should be barred. *Speedy Trial Act of 1974: Hearings on S. 754, H.R. 7873, H.R. 207, H.R. 658, H.R. 687, H.R. 773 and H.R. 4807 Before the Subcomm. on Crime of the House Comm. on the Judiciary,* 93d Cong., 2d Sess. 207 (1974) [hereinafter *1974 House Hearings*]. (statement of James L. Treece) That balancing test would focus on the seriousness of the offense, the fault of the prosecutor, and the prejudice to the defendant (*ibid.*). Such a test would ensure that the criminal did not go free simply because there had been "technical noncompliance" with the time limits of the Act (*id.* at 214).

The bill's sponsors recognized that Congress would not pass the proposed speedy trial legislation unless the stringent dismissal sanction was relaxed. See *1974 House Hearings* 161 (testimony of Sen. Ervin) ("on the Senate side opposition to [an unqualified] dismissal with prejudice provision was so intense that passage would have been impossible with such a provision"). The bill was therefore amended on the floor of the House to include the provision that became Section 3162(a)(2). See 120 Cong. Rec. 41774-41775, 41778, 41793-41794 (1974) (remarks of Rep. Cohen). There was no opposition to the amendment voiced during the debates.[10] Instead, because many persons feared that the speedy trial bill "would turn criminals loose" (*id.* at 41778 (remarks of Rep. Anderson)), the sponsors of the bill warned that the amendment "must be adopted if the bill is to pass" (*ibid.* (remarks of Rep. Wiggins)). See also *id.* at 41794 (remarks of Rep. Conyers).

[10] Indeed, other amendments were proposed that would have further reduced the instances in which dismissal with prejudice could be ordered. See, *e.g.*, 120 Cong. Rec. 41782 (1974) (remarks of Rep. Frenzel) (supporting an amendment that would "require mandatory dismissal with prejudice only in those cases where there has been extreme Government delay in prosecution").

Most of the discussion of the amendment was devoted to clarifying the content of the factors the courts were directed to consider. Congressman Dennis proposed that the amendment be modified to require explicitly that a court consider "the degree of prejudice to the defendant's ability to prepare his case" (120 Cong. Rec. 41794 (1974)). Congressman Wiggins (one of the bill's sponsors) explained, however, that the amendment, as written, would permit the court to take prejudice into account (*id.* at 41778):

> No factor, nor combination of factors, requires * * * a particular form of dismissal. In most cases it is to be expected that no dismissal with prejudice will be ordered unless actual prejudice to the defendant can be shown occasioned by the further delay implicit in a refiling in the case against him, and that actual prejudice to the defendant outweighs societal interests in prosecuting the alleged offender.

Congressman Cohen, the author of the amendment that created the balancing test, feared that if prejudice were listed, it would become the only factor considered by the courts. But he too agreed that prejudice could be taken into account (*ibid.*). See also *id.* at 41795 (remarks of co-sponsor Rep. Conyers) (prejudice is "a factor that would be considered"). After it was uniformly agreed that prejudice was a factor that could be weighed in the balance, the amendment was adopted without further modification (*id.* at 41619, 41796).

The dismissal sanction was initially scheduled to take effect on July 1, 1979. 18 U.S.C. (1976 ed.) 3163(c). In that year, Congress postponed the effective date of the Act for an additional year to give the parties and the courts more time to become accustomed to the stringent time limits of the Act. 18 U.S.C. 3163(c). Congress did not, however, modify the dismissal sanction itself. Instead, the Senate

Report reiterated that the court "must consider" the factors enumerated in Section 3162(a)(2) before choosing a sanction. S. Rep. 96-212, 96th Cong., 1st Sess. 9 (1979). And the Report summarized the derivation of the sanction provision as finally adopted in 1974 (*ibid.*):

> despite the fact that both this Committee and the House Committee on the Judiciary recommended dismissal sanctions of greater severity, the Congress acceded to the position advanced by the Department of Justice that society's interests would be better served by assuring that the prospect of leaving serious criminal conduct unpunished for the sake of speed alone would not occur.[11]

Several points that bear on this case are clear from the language and legislative history of Section 3162(a)(2).

---

[11] In discussing the suspension of the dismissal sanction, the House Report stated in passing (H.R. Rep. 96-390, 96th Cong., 1st Sess. 8-9 (1979)):

> While the Act does permit dismissal without prejudice, extensive use of this procedure could undermine the effectiveness of the act and prejudice defendants, and the committee intends and expects that use of dismissal without prejudice will be the exception and not the rule.

Because Congress was not at that time considering a modification to Section 3162(a)(2), the observation in the 1979 House Report, made five years after the enactment of the sanctions provision, is not entitled to much weight. See *South Carolina* v. *Regan*, 465 U.S. 367, 378 n.17 (1984); *Weinberger* v. *Rossi*, 456 U.S. 25, 35 (1982); *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 117 (1980). It cannot override the contrary contemporaneous legislative history from 1974 that led to the enactment of the sanctions provision as it exists today. In 1974, Congress specifically rejected the Senate bill, which limited reprosecution to exceptional cases. Moreover, the one-sentence remark in the 1979 House Report is especially unenlightening as an indication of prior congressional intent, because it is squarely contradicted by the discussion of the same point in the 1979 Senate Report, which is quoted in the text.

First, the dismissal-without-prejudice option is a central feature of the Speedy Trial Act. While the Senate and House committees believed that dismissal with prejudice was necessary to put teeth into the Speedy Trial Act, Congress as a whole did not share that view. As the debates revealed, many members of Congress believed that complete absolution for the criminal is too severe a sanction for a nonprejudicial violation of the Act's stringent time limits, and that view prevailed. Congress specifically rejected the sanction provisions contained in both committee bills, which would have required dismissal with prejudice in all or almost all cases.

Second, the language of the Act and its legislative history make clear that the statute does not incorporate a presumption in favor of dismissals with prejudice. On the contrary, the premise of the amendment to the sanctions provision was that dismissals without prejudice would be an adequate sanction for most statutory speedy trial violations. The courts of appeals that have addressed the issue have agreed that the version of Section 3162(a)(2) that Congress enacted was designed to reject the presumption in favor of dismissal with prejudice that had been a feature of the Senate bill. See *United States* v. *Salgado-Hernandez*, 790 F.2d 1265, 1267 (5th Cir. 1986), cert. denied, No. 86-5229 (Nov. 17, 1986); *United States* v. *Brown*, 770 F.2d 241, 244 (1st Cir. 1985), cert. denied, 474 U.S. 1064 (1986); *United States* v. *Caparella*, 716 F.2d 976, 978-980 (2d Cir. 1983).

Third, Congress intended that prejudice to the defendant would be one of the factors bearing on whether the dismissal should be with or without prejudice. That much is apparent from the language of Section 3162(a)(2), which requires the court to consider the impact of reprosecution on the administration of justice, and it is clear from the House debates, where the sponsors agreed that prejudice

to the defendant was a proper factor to consider in deciding whether to bar reprosecution. Again, the courts of appeals that have addressed the point have agreed that prejudice to the defendant is a factor that should be taken into account in making the Section 3162(a)(2) determination. See *United States* v. *Peeples*, 811 F.2d 849, 851 (5th Cir. 1987); *United States* v. *Phillips*, 775 F.2d 1454, 1455-1456 (11th Cir. 1985); *United States* v. *Brown*, 770 F.2d 241, 244 (1st Cir. 1985), cert. denied, 474 U.S. 1064 (1986); *United States* v. *Bittle*, 699 F.2d 1201, 1208 (D.C. Cir. 1983); *United States* v. *Carreon*, 626 F.2d 528, 533-534 (7th Cir. 1980).

Fourth, and perhaps most important, Section 3162(a)(2) does not permit a court to bar reprosecution based on the consideration of only a single factor, such as the effect that permitting reprosecution would have on encouraging compliance with the Speedy Trial Act. The failure to weigh each of the statutory factors would violate the plain terms of the statute, which directs that a court "*shall consider*, among others, *each* of the following factors" (18 U.S.C. 3162(a)(2) (emphasis added)). Moreover, the adoption of Section 3162(a)(2) in place of the more stringent committee proposals was a clear indication that Congress did not agree with the view expressed in the committee reports that dismissal with prejudice was necessary to ensure compliance with the Speedy Trial Act. Under Section 3162(a)(2), the effect of a "with prejudice" dismissal on the administration of the Speedy Trial Act, *i.e.*, the degree to which an absolute bar to reprosecution would encourage compliance with the Act, was demoted from an irrebutable (House bill) or nearly irrebuttable (Senate bill) presumption to simply one of several competing considerations to be taken into account in determining whether dismissal is appropriate. In sum, the language and background of Section 3162(a)(2) makes quite clear that

the perceived didactic effect of a bar to reprosecution is not enough to justify that remedy if the other considerations favor dismissal without prejudice.[12]

B. The Balancing Test, When Applied to the Facts of This Case, Requires Dismissal Without Prejudice.

1. We do not contest the conclusion of both courts below that the Speedy Trial Act was violated in this case and that dismissal of the indictment was therefore mandatory.

The courts below identified three periods of nonexcludable delay: the six days between the conclusion of the first *Seigert* trial and the dismissal of the state charges; the five days between the date on which the federal marshals were notified of the state court dismissal and the date on which respondent was taken before a federal magistrate on the outstanding bench warrant; and the four days of extra travel time on the first attempt to return respondent to Washington.

Although the matter is not free from doubt, we do not argue here that the entire period attributable to the removal proceedings was excludable from the 70-day pre-

---

[12] Another provision of the statute, 18 U.S.C. 3162(b), also supports the view that teaching the government a lesson is not, in and of itself, a sufficient basis for dismissing an indictment with prejudice. Section 3162(b) permits the court to punish the dilatory prosecutor by fining him up to $250, by suspending him from practice for a period of up to 90 days, or by filing a report concerning the prosecutor with an appropriate disciplinary committee. 18 U.S.C. 3162(b)(C), (D), and (E). In most instances, these penalties will have a greater didactic effect than dismissing an indictment with prejudice. And when the prosecutor is punished directly, society does not suffer the effects, as it does when a criminal is granted complete absolution for his offense on a ground unrelated to his guilt.

trial period.[13] We do, however, assert that the courts below erred in refusing to exclude the period between the conclusion of the first *Seigert* trial (February 22) and the day on which the state charges were dismissed (February 28). The Speedy Trial Act does not require the marshal to interfere with state proceedings. Accordingly, he was under no obligation to return respondent to Washington before the state charges were dropped. 18 U.S.C. 3161(h)(1)(D); *United States* v. *Bigler*, 810 F.2d 1317, 1320-1321 (5th Cir. 1987), cert. denied, No. 86-7083 (Oct. 5, 1987); *United States* v. *Redmond*, 803 F.2d 438, 440 (9th Cir. 1986), cert. denied, No. 86-6584 (Apr. 20, 1987); *United States* v. *O'Bryant*, 775 F.2d 1528, 1532 (11th Cir. 1985); *United States* v. *Rodriguez-Franco*, 749 F.2d 1555, 1559 n.2 (11th Cir. 1985); *United States* v. *Lopez-Espindola*, 632 F.2d 107, 109-111 (9th Cir. 1980); *United States* v. *Goodwin*, 612 F.2d 1103, 1105 (8th Cir.), cert. denied, 446 U.S. 986 (1980). The district court did not suggest that the marshal should have returned respondent to Washington during that period. The court, however, faulted the marshal for not moving respondent from the San Francisco County jail to the county jail in neighboring San Mateo County, where the state charges were pending. But such a move was unnecessary and should have no effect on the speedy trial calculations. The sheriff in San Francisco was under court order to deliver respondent to San Mateo authorities upon request. E.R. 20. The marshal's failure to move respondent to San Mateo County in no way impeded the State's ability to prosecute respondent on the local charges.

[13] We note that 18 U.S.C. 3161(h)(1)(G), which excludes delay attributable to a defendant's removal from one district to another, has been construed in guidelines adopted by the Judicial Conference and the Second Circuit as excluding the entire period from a defendant's arrest or capture until his first post-removal appearance in the charging district. See Committee on the Administration of the Criminal Law, Judicial Conference of the United States, *Guidelines to the Administration of the Speedy Trial Act of 1974, as Amended* 38-40 (rev. 1979, with amendments through Oct. 1984); Second Circuit Judicial Council Speedy Trial Act Coordinating Comm., *Guidelines Under the Speedy Trial Act* 18-20 (1979), *reprinted in The Speedy Trial Act Amendments of 1979: Hearings on S. 961 and S. 1028 Before the Senate Comm. on the Judiciary*, 96th Cong., 1st Sess. 386-436 (1979). Under this interpretation, all the delay until respondent first appeared in court in Washington following his flight would be excluded, and there would have been no violation here. Because neither court below considered this interpretation of Section 3161(h)(1)(G), we do not urge it in this Court.

We do not here dispute the district court's conclusion that the other two periods were chargeable. Although the marshal learned at some time on Friday, March 1, 1985, that the outstanding state charge had been dismissed, respondent was not taken before a federal magistrate for an initial appearance on the bench warrant until the following Wednesday, March 6. The district court counted that period as constituting a five-day delay for speedy trial purposes. Second, Section 3161(h)(1)(H) of the Act establishes a presumption that any transportation time in excess of 10 days is unreasonable, and the marshal did not arrange for respondent's transportation to Washington after the first *Seigert* trial until 14 days after the removal order. Although we believe that in an appropriate case the presumption can be rebutted by showing that the extra time taken was justified by economic or security considerations, we do not contend that such a showing was made here. Accordingly, because the marshal took four more days than the Act generally allows to return the fugitive respondent to the charging district, we do not challenge the decision of the lower courts to count those four days.

Under this analysis, we acknowledge that nine speedy trial days elapsed after respondent's capture. When added to the 69 days that the parties agreed had elapsed before respondent absconded, the 70-day limit of the Act was exceeded by eight days. Accordingly, dismissal had to be ordered, and the district court had to consult the balancing test of Section 3162(a)(2) to determine whether the dismissal should be with or without prejudice.

2. When the statutory factors that comprise the mandatory balancing test are weighed, the scale tips heavily in favor of dismissal without prejudice.

The first factor in the test is the seriousness of the offense. As both courts below agreed, conspiracy to distribute cocaine and possession of cocaine with the intent to distribute it are serious crimes. See also *United States* v. *May*, 819 F.2d 531, 535 (5th Cir. 1987); *United States* v. *Simmons*, 786 F.2d 479, 485 (1986), vacated on other grounds, 812 F.2d 818, 819 (2d Cir. 1987); *United States* v. *Brown*, 770 F.2d at 244; *United States* v. *Carreon*, 626 F.2d at 533-534. The courts of appeals have held that where the offense is serious, the indictment should be dismissed only for a "correspondingly serious" delay in violation of the Act. *United States* v. *Salgado-Hernandez*, 790 F.2d at 1268; *United States* v. *Simmons*, *supra*; *United States* v. *Phillips*, 775 F.2d at 1455-1456; *United States* v. *Hawthorne*, 705 F.2d 258, 260-261 (7th Cir. 1983); *United States* v. *Carreon*, *supra*. Here, however, the delay in our view was eight days, and even in the district court's view it was only 14 days. That period of delay is not "correspondingly serious." See, *e.g.*, *United States* v. *Brown*, *supra* (35-day delay not serious); *United States* v. *Hawthorne*, *supra* (9-day delay not serious); *United States* v. *Melguizo*, 824 F.2d 370, 372 (5th Cir. 1987), petition for cert. pending, No. 87-551 (same); *United States* v. *Bittle*, 699 F.2d at 1208 (13-day delay not serious). Compare *United States*

v. *Stayton*, 791 F.2d 17, 21-22 (2d Cir. 1986) (23-month delay serious); *United States* v. *Russo*, 741 F.2d 1264, 1267 (11th Cir. 1984) (several-month delay serious). As the Seventh Circuit has noted, where Congress has provided for alternative sanctions "the purpose of the Act would not be served by requiring the court to impose the maximum sanction for a minimum violation." *United States* v. *Hawthorne*, 705 F.2d at 261. Hence, the first factor in the balancing test strongly favors dismissal without prejudice.

The second factor—the circumstances that led to the dismissal—also strongly favors dismissal without prejudice. The delays here were not attributable to any intentional government misconduct or even negligence that resulted in prejudice to respondent. See *United States* v. *Miranda*, 835 F.2d 830, 834-835 (11th Cir. 1988). Cf. *United States* v. *Loud Hawk*, 474 U.S. at 315-317. Moreover, any delay in the date of respondent's trial was ultimately the product of respondent's failure to appear on the scheduled day of trial, not any default on the part of the prosecution. The government was prepared to go to trial, as scheduled, on November 19, 1984. The government did nothing to postpone that trial date. Respondent, however, was obviously less interested in speedy justice. Rather than submit to the jurisdiction of the court for a swift adjudication of his guilt or innocence, respondent fled, thereby postponing the proceedings indefinitely. It was respondent's fault that the marshal had to be called in, upon respondent's capture by state authorities, to undo what respondent had done by absconding from the site of the trial.

For purposes of this case, we do not dispute that the marshal was slower in performing this task than the Speedy Trial Act permits. But it was respondent—not the marshal—who was principally responsible for the loss of the opportunity for a speedy trial. And it was respondent, not the marshal, who violated the public's right to speedy

justice by his flight from prosecution. A defendant who deliberately delays his trial should rarely, if ever, be entitled to the ultimate, irrevocable sanction of dismissal with prejudice. *United States* v. *Peeples*, 811 F.2d at 851; *United States* v. *McAfee*, 780 F.2d 143, 146 (1st Cir. 1985), vacated on other grounds, No. 85-1959 (Oct. 6, 1986), on remand, 808 F.2d 862 (1st Cir. 1986). Cf. *Molinaro* v. *New Jersey*, 396 U.S. 365, 366 (1970) (flight "disentitles the defendant to call upon the resources of the Court for [a] determination of his claims"). As the dissenting judge below observed, the Speedy Trial should not be interpreted to let a defendant "be the instrument of his own deliverance" (Pet. App. 22a). In sum, the "facts and circumstances of the case which led to the dismissal" indicate that the second factor in the balancing test favors a dismissal order permitting reprosecution.

Finally, by the terms of Section 3162(a), the courts are required to consider "the impact of a reprosecution on the administration of [the Speedy Trial Act] and on the administration of justice." A reprosecution in this case would serve the administration of justice in several ways. First, it would send a message to defendants that they will not profit by absconding. They cannot flout the public's right to speedy justice and expect to gain complete absolution when their flight results in a technical violation of the Act.[14] Second, a reprosecution would serve the public's in-

[14] It is no answer to say, as did the court of appeals (Pet. App. 10a-11a), that defendants who abscond are still subject to prosecution for absconding. Defendants flee because they believe they have a good prospect of avoiding any prosecution at all – either for the underlying charges or for the additional crime of absconding. To add to that calculus the chance that the underlying charges will be dismissed on speedy trial grounds only increases the incentive to flee, particularly where – as in this case – the maximum sentence for failure to appear is lower than the maximum sentence for the charges from which the defendant is fleeing.

terest in seeing that narcotics offenders are justly punished and not released on grounds unrelated to their guilt. See *Barker* v. *Wingo*, 407 U.S. at 519-521; cf. *Arizona* v. *Washington*, 434 U.S. 497, 505 (1978).

In addition, as we have noted, the impact of a reprosecution on the administration of justice includes the prejudice to the defendants, if any, caused by the Speedy Trial Act violation. Respondent has never claimed that his ability to defend against the charges has been impaired by the delay in returning him to Washington for trial.[15] In fact, it is more often the government, not the defendant, that suffers prejudice to its case as a result of delays in the date of trial. See *United States* v. *Loud Hawk*, 474 U.S. at 315 ("[D]elay is a two-edged sword. It is the government that bears the burden of proving its case beyond a reasonable doubt. The passage of time may make it difficult or impossible for the government to carry this burden.") In this case, that general rule held true: the government was put to the trouble of assembling its witnesses and preparing its case in November, when respondent did not appear for trial. The government then had to assemble its witnesses again and prepare for trial in January, when respondent's co-defendant was tried alone because respondent was still

[15] Indeed, respondent consistently showed by his actions that he did not object to delays. He not only deliberately delayed trial by absconding; even after his recapture, respondent showed no interest in a prompt return to Washington for trial. Although he now complains that he was not brought before a federal magistrate on the bench warrant until the Wednesday following the Friday on which the marshal was notified of the dismisal of the state charges, he made it clear at the time that he was quite ready to postpone the completion of the removal procedures. It was largely because of delays sought by respondent, including his failure to waive the formality of an identification hearing until the day scheduled for it, that those proceedings were not completed for almost a month.

a fugitive. It was the government that had to bear the expense of returning respondent to Washington, escorted by the marshal. And if a reprosecution had been permitted, the government would have had to prepare its case for a third time within a six-month period, a cost and inconvenience wholly attributable to respondent's flight.

Although the court of appeals found no prejudice to petitioner's ability to defend himself, the court nevertheless stated in passing (Pet. App. 17a) that respondent suffered prejudice because "he was incarcerated during the entire period [of pretrial delay]." But in making that observation, the court apparently overlooked the fact that respondent was arrested on a bench warrant charging him with failure to appear for trial, and it was that charge—as to which there was no Speedy Trial Act violation—that resulted in his incarceration between February 5 and the time of his return to Washington for trial.[16] For that reason, the court of appeals erred in considering incarceration as a form of prejudice in this case. See *United States* v. *Salgado-Hernandez*, 790 F.2d at 1268-1269.

---

[16] It is reasonably clear that the eight-day period that constituted the violation in this case did not have the effect of delaying respondent's trial date. Respondent was returned to California to testify at the *Seigert* retrial on April 18. Even absent the delay in initiating the removal proceedings and in returning him to Washington after the removal order, it is unlikely that respondent would have arrived in Washington before early April. And it is highly unlikely that respondent's trial could have been held during the period between his return to Washington and April 18, when the district court ordered him returned to California for the *Seigert* retrial, particularly since respondent's counsel was heavily involved in the *Seigert* case. The government and defense counsel would surely have sought, and been granted, a continuance of respondent's trial under Section 3161(h)(3)(B)(8) of the Speedy Trial Act until after the completion of the *Seigert* trial.

The only statutory factor that could be regarded as cutting in respondent's favor is the effect of a reprosecution on the administration of the Speedy Trial Act. Complete absolution is more likely than a dismissal without prejudice to lead to modifications in procedures that will assure more rapid pretrial processing. In one sense, of course, that factor will always weigh in favor of dismissal with prejudice: by increasing the penalty for noncompliance, compliance is always encouraged. Yet by providing for dismissal without prejudice in many cases, Congress indicated that it did not believe the drastic sanction of dismissal with prejudice would always be necessary or appropriate to induce compliance with the Act. Contrary to the assumption of the courts below (Pet. App. 17a-18a, 30a-31a), dismissal without prejudice is not a toothless sanction, and it should suffice in most cases to encourage modifications in procedures.

The sanction of dismissal itself imposes several substantial costs on the government, even when the dismissal is without prejudice. It forces the government to abort its prosecution, frequently on the eve of trial; it requires the government to seek and obtain a new indictment if it decides to reprosecute; and it exposes the government to dismissal on statute of limitations grounds if the limitations period has lapsed prior to the reindictment. See *United States* v. *Peloquin*, 810 F.2d 911, 912-913 (9th Cir. 1987). When a dismissal is ordered after trial or on appeal, the government faces not only the burden of re-presenting the case to a grand jury, but also the burden of conducting a new trial. It was therefore reasonable for Congress to conclude that the burdens and risks inherent in having to start the prosecution again from the beginning will usually be sufficient to encourage the prosecutor to take care to

comply with the provisions of the Act, even if the consequence of failure is not invariably a bar to prosecution altogether. The district court's contrary conclusion—that a dismissal without prejudice would make the Act a "hollow guarantee" (Pet. App. 30a-31a)—is at odds both with the judgment of Congress and with the realities of criminal practice.

This is not a case in which the government knowingly violated the Speedy Trial Act. While the district court found that the government's conduct was "lackadaisical," the Speedy Trial Act principles applicable to the return of fugitive defendants were not settled, and there is no evidence that the marshal in the Northen District of California was aware of the Speedy Trial Act problem in this case at the time of respondent's arrest and the removal proceedings. Moreover, even the didactic effect of a dismissal with prejudice may be minimal in a case such as this one. The Speedy Trial Act violation was attributable to the actions of the United States Marshal in the Northern District of California; the dismissal affected the United States Attorney for the Western District of Washington. While both offices are part of the Department of Justice, and while both may respond generally to the dismissal of prosecutions with prejudice, the impact of such a dismissal is muted when the penalty is assessed against a different office from the one responsible for the violation. In this case, then, even the effect of the dismissal on the administration of the Speedy Trial Act is not a factor that strongly favors dismissal with prejudice.

3. The court of appeals held that the district court's choice of remedy was reviewable only under an abuse of discretion standard and that the court in this case did not abuse its discretion. We agree that a district court enjoys a measure of discretion in selecting the appropriate remedy. See *United States* v. *Fountain*, No. 86-2622 (7th Cir. Feb. 22, 1988) (upholding dismissal without prejudice as within district court's discretion); *United States* v. *Kramer*, 827 F.2d 1174, 1179 (8th Cir. 1987) (reversing dismissal with prejudice as an abuse of discretion); *United States* v. *Phillips*, 775 F.2d at 1455-1456 (same). That discretionary choice, however, is "not left to a court's 'inclination, but to its judgment; and its judgment is to be guided by sound legal principles' " (*Albermarle Paper Co.* v. *Moody*, 422 U.S. 405, 416 (1975) (citation omitted)). To say that the decision is committed to the discretion of the district court "hardly means that it is unfettered by meaningful standards or shielded from thorough appellate review" (*ibid.*). Thus, in order to be upheld under an "abuse of discretion" standard, a district court's decision must reflect consideration of the competing interests, and the balancing of those interests must be reasonable. See *Piper Aircraft Co.* v. *Reyno*, 454 U.S. 235, 257 (1981). That analysis applies to discretionary decisions generally, including a district court's choice of sanctions under the Speedy Trial Act. As the court of appeals explained in *United States* v. *Kramer*, 827 F.2d at 1179:

> An abuse of discretion occurs when a relevant factor that should have been given significant weight is not considered, when an irrelevant or improper factor is considered and given significant weight, or when all proper and no improper factors are considered, but the court in weighing those factors commits a clear error of judgment.

In this case, the district court abused its discretion in both respects. First, as we have explained, the district court gave only perfunctory consideration to factors such as the seriousness of the offense, the prejudice to the defendant, the relative fault of the parties, and the effect of a "with prejudice" dismissal on the administration of justice. The court instead regarded the didactic effect of

the dismissal with prejudice as the controlling—and virtually dispositive—factor, standing alone.

Second, to the extent that the district court weighed the competing considerations, it committed a clear error of judgment in concluding that the balancing test favored dismissal with prejudice. As we have discussed, when all the factors are weighed the scale tips overwhelmingly in favor of dismissal without prejudice. The brief delay in returning this fugitive to Washington pales in comparison with his serious violations of the narcotics laws, the lack of prejudice, respondent's own responsibility for the delay, and society's interest in seeing that narcotics offenders are justly punished.

Justice is generally served when a criminal case is resolved on the basis of the defendant's guilt or innocence. Here, the lower courts have given respondent his freedom without such a determination. There was no constitutional violation in this case; there was no egregious behavior on the part of the government; and there was no intentional disregard of respondent's statutory speedy trial rights. At worst, there was an inadvertent, technical violation of the Act by the marshal. Dismissal of the indictment without prejudice is a sufficient sanction for an error of that nature. Complete absolution, on the other hand, is a remedy totally disproportionate to the injury suffered or the default on the part of the government, and it is a penalty that society should not be forced to suffer.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

CHARLES FRIED
Solicitor General
WILLIAM F. WELD
Assistant Attorney General
WILLIAM C. BRYSON
Deputy Solicitor General
HARRIET S. SHAPIRO
Assistant to the Solicitor General
PATTY MERKAMP STEMLER
Attorney

MARCH 1988

U.S. GOVERNMENT PRINTING OFFICE: 1988 — [illegible]